FILED
FEB 16 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 823

CHARLES JOSEPH O'BRIEN and
THOMAS PARISI,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES

PHILIP A. GILLIS,
2312 Guardian Building,
Detroit, Michigan,
Attorney for Petitioner, O'Brien.
IVAN BARRIS,
2066 Penobscot Building,
Detroit, Michigan,
Attorney for Petitioner, Parisi.

ARTHUR KARGER,
600 Madison Avenue,
New York, N.Y.
BERNARD J. MELLMAN,
408 Olive Street,
St. Louis, Missouri,
Of Counsel.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 823

CHARLES JOSEPH O'BRIEN and
THOMAS PARISI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES

IA.

Williamson v. United States and *United States v. Davis*, cited by the Government (G. br. pp. 5-6), both involved the validity of indictments charging the unlawful importation of narcotics. The holdings were specifically limited to such prosecutions, because "Section 174, 21 U.S.C.A. makes the importation of *all narcotics* illegal, . . ."[1] "Conversely, the allegation 'contrary to law' is held inadequate as a substitute for detailed allegations where the articles involved are normal objects of lawful trade.'"[1] The rationale of these cases obviously has no application to prosecutions concerning a statue of St, Theresa.

[1] 272 F.2d at 250. The emphasis is that of the Court.

IB.

The conflict between the decision below and *Hughes v. United States* involves more than a rule of pleading (G. br. pp. 6-7). According to *Hughes,* in a prosecution under 18 U.S.C. §549 "larcenous intent—knowledge of a wrongful act—may not be dispensed with." But the Court below said "the case before us is in the first class of cases decided in *Hargrove* [*v. United States,* 67 F.2d 820]" and, quoting from *Hargrove,* said, " 'In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent.' "

Whether or not this Court would overlook a conflict of circuits on a mere rule of pleading, what is presented here is that, by reason of conflict of circuits, the same action is held to be innocent in the First Circuit and criminal in the Sixth Circuit.

IC.

"[Petitioner's] criminal intent was clearly proved," says the Government (G. br. p. 6), apparently as part of an argument almost but not quite made that evidence at trial can supply the elements which the indictment fails to provide. We would not bother to reply to this incomplete argument except that it is based upon a serious misquotation of the record below.

In its statement (p. 4) and again in argument, the Government says:

> "Petitioner O'Brien told customs agents that Mr. Young, the president of the Detroit Harbor Terminal, had asked him to remove *the merchandise* from the yard." (G. br. pp. 8-9.) (Emphasis supplied.)

There is no such testimony. The only evidence of O'Brien's participation was his statement that "he had been asked

about five or six months previous to this date by Mr. Young * * * if he would arrange to have someone remove *some scrap* from the terminal" (73a). Young was asked if he had a conversation with O'Brien "relative to the removal of junk or scrap" and his answer was "I could have. I don't remember" (120a-121a).[3]

The sufficiency of the evidence was O'Brien's first point on appeal to the Court below. It was not raised in the petition for certiorari only because the question is of little significance except to the parties involved. It would not be raised now except for the Government's misquotation. In the setting of this case, the great difference between "some scrap" and "some merchandise" is apparent to anyone familiar with the record.[4]

---

[3] Young said he never gave permission to remove "merchandise."

[4] O'Brien's defense was based upon the rationale of *Morissette v. United States*, 342 U.S. 246. He requested and received the following instruction:

> "It is his further theory that he was approached by a responsible official of the Detroit Harbor Terminal and requested to notify a scrap dealer or junk collector of the existence of this scrap on the premises of the Detroit Harbor Terminal, with the view to having the scrap dealer or junk collector remove the scrap, and that because of this, the defendant O'Brien contacted Sam Finazzo, who, has been acquitted in this case, and asked Finazzo if he would be interested in removing the scrap. * * *
>
> "It is also his theory that if either Finazzo or the defendant Parisi exceeded his request that they remove scrap, and in fact removed valuable merchandise, that he in no way aided and abetted such removal."

II.

Blumenthal v. United States[5] doesn't justify the trial court's instruction on Area B. On the contrary, it was there said:

> "It is a question of law for the court to determine what constitutes a common carrier, though it may be a question of fact, whether, under the evidence, if it is disputed, a carrier comes within the definition of a common carrier and is carrying on its business in that capacity." 88 F.2d at 528.

We agree that what constitutes a bonded warehouse is a question of law. But whether Area B of the terminal was such a bonded warehouse was most certainly a question of fact. Indeed, the trial court recognized the instruction to be a "comment on the legal effect of the evidence," but maintained that it did not "unduly invade the province of the jury." 255 F. Supp. 766.[6]

III.

The Government now urges (G. br. p. 9) that the general cautionary instruction prevented prejudice to petitioners through the argument on O'Brien's failure to contradict the testimony of witness Young. The assertion is without authority, and contrary to the Government concession made in *Stewart v. United States*, 366 U.S. 1, 10, that "the danger of the situation would have been increased by a cautionary instruction."

---

[5] 88 F.2d 522, cited in Government brief, p. 8.

[6] The trial judge maintained that the application for the bond covering Area B and the accompanying map were "assumed to be accurate" and "their authenticity was not questioned." These assertions are belied not only by petitioners' extensive cross-examination of the witnesses on the point, but by their rejected requested instructions.

IV.

The deliberate vagueness of the Government's disclosure of illegal electronic eavesdropping and the carefully guarded language used in making it strongly suggest that even the Solicitor General is not satisfied with the accuracy and completeness of the information received from the FBI which he now tenders to this Court.

In one important matter, we can demonstrate the disclosure is inaccurate. The Solicitor General argues that reversal of petitioner O'Brien's conviction is not required because "he was not, like the petitioner in *Black*,[7] personally the subject of direct surveillance." This assertion is gainsaid by the record in *Hoffa v. United States*, No. 32, this term.[8] There, an FBI agent testified that he was assigned to a surveillance of O'Brien (3366a) during January and February, 1964.[9] The phone call O'Brien made to his attorney upon which the FBI eavesdropped was likewise in January, 1964.

The sworn testimony of FBI agents in *Hoffa* was that the numerous observations and photographs of the defendants and their attorneys were "incidental to the surveillance we were conducting" of O'Brien and others acquainted with Hoffa (3411a). Now, in *O'Brien*, although the time period overlaps, electronic eavesdropping on O'Brien's discussion of his case with others and conversations with his lawyer are incidental to an investigation of an unidentified ac-

---

[7] *Black v. United States*, 385 U.S. 26.

[8] The question of trial surveillance of Hoffa was not before this Court because of the limited grant of certiorari. For that reason the Solicitor General may have overlooked that record. But the issue was raised and a record made in the lower courts. The 4-digit references in this portion of our reply are to Appellants' Joint Appendix filed in the Court of Appeals for the Sixth Circuit in *United States v. Hoffa, et al.*, Nos. 15876-15879.

[9] O'Brien was under surveillance in Chattanooga, Tennessee, from the time of his arrival at the airport (3380a) which indicates that the surveillance preceded his arrival.

quaintance and not part of a surveillance of O'Brien. And if the unidentified acquaintance of O'Brien should go on trial, who can say under what shell the Government will place the pea?

The disclosures require reversal regradless of who was in the focus of the FBI's illegal activity. Here, as in *Black* and *Schipani*, the Government admits its violation of both the Fourth and Sixth Amendments. As in those cases, the convictions should be reversed for new trial. At the new trial, all factual issues can be thoroughly aired, including the strength and impact of the Government's Fourth and Sixth Amendment violations. Such disposition of this case would avoid the necessity of considering whether to review the questions presented for certiorari. Any other disposition of the case in regard to the Fourth and Sixth Amendment questions, such as the remand requested by the Government, should fairly preserve the opportunity for this Court, now or in the future, to consider whether, as we urge, the questions presented in our petition warrant this Court's review.

Respectfully submitted,

PHILIP A. GILLIS,
Attorney for Petitioner O'Brien,
2312 Guardian Building,
Detroit, Michigan 48226.

IVAN BARRIS,
Attorney for Petitioner Parisi,
2066 Penobscot Building,
Detroit, Michigan 48226.

ARTHUR KARGER,
600 Madison Avenue,
New York, New York.

BERNARD J. MELLMAN,
408 Olive Street,
St. Louis, Missouri